

SOUTH AFRICA / JUDGMENT

Secequip (Pty) Limited v Secure Excel (Pty) Limited (19449/16) [2016] ZAGPJHC 208 (2 August 2016)

[2016] ZAGPJHC 208

COURT

South Gauteng High Court, Johannesburg

BEFORE

G Hulley

CASE / FILE NUMBER

19449/16

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OFFICE OF THE CHIEF

JUSTICE

REPUBLIC OF SOUTH

AFRICA

HIGH COURT

GAUTENG LOCAL

DIVISION, JOHANNESBURG

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

CASE

NO: 19449/16

Date

of Hearing: 28 July 2016

Date

of Judgment: 2 August 2016

In the

matter between:

SECEQUIP(PTY)

LIMITED

Applicant

and

SECURE

EXCEL (PTY) LIMITED

Respondent

JUDGMENT**HULLEY AJ:**

[1] This is an application for a money judgment. The applicant seeks payment of an amount of R430 852.23 together with interest

thereon “at the compound rate of 3% (three percent) per annum above the prime overdraft rate charged by the Applicant’s

bankers from time to time, from date of service of this Application until date of final payment”.

[2] In support of this relief the applicant filed a five-page affidavit comprising some eighteen paragraphs. Excluding the prayers and the introductory paragraphs that include a description and citation of the parties, the founding affidavit consists of a mere two pages.

[3] The essence of the applicant’s case is that during the period 16 August 2012 to 10 April 2014 the respondent placed various

orders

with it for the purchase of security equipment, it accepted the orders and an agreement was concluded on the following terms:

3.1 The applicant would supply the respondent with security equipment and would charge the respondent its “usual prices” in exchange therefor.

3.2 The applicant would deliver the security equipment ordered by the respondent to the latter’s premises and the respondent would

then “sign in acknowledgement of receipt of the security equipment”.

3.3 The purchase of the equipment was subject to the applicant’s terms and conditions as set out in an addendum to the affidavit.

3.4 Simultaneously with the delivery of the security equipment the applicant would render its invoice which was payable within 30 days of receipt.

[4] The applicant alleges that it accepted all orders placed by the respondent and delivered the security equipment ordered by the respondent to it and rendered its invoices for payment.

[5] Attached to its founding affidavit are what the applicant described as two statements of account, one for an account identified as “JHB-SEC050” and the other for account “JHB-SEC051”. Both accounts were for “goods sold and delivered”.

- [6] The applicant also attached “the invoices and credit notes” in support of these accounts. It emerged during argument that the sum of the amounts reflected in the invoices less those in the credit notes make up the amounts reflected in the statements of account and described as “Amount Due”.
- [7] The applicant alleged that “a representative of the Respondent signed the aforesaid invoices acknowledging delivery of the goods supplied by the Applicant to the Respondent” and in breach of the agreement the respondent “failed to pay the rendered invoices timeously, alternatively, failed to make full payment of all invoices rendered by the applicant to the respondent”.
- [8] It emerged, once again for the first time during argument, that the reference to “alternatively” in the passage quoted was inaccurate and that what the deponent intended to convey was that in respect of some invoices the respondent failed to make full payment and in relation to others the respondent made partial payment only.
- [9] The applicant concluded its case by stating that the “statement of the Respondent’s account with the Applicant, clearly

illustrates an amount of R344 613.88 (three hundred and forty four thousand six hundred and thirteen rand and eighty eight cents) and R86 238.35 (eighty six thousand two hundred and thirty eight rand and thirty five cents) as owing to the Applicant”.

The sum of these two amounts is R430 852.23, the amount claimed by the applicant.

- [10] In its opposing papers the respondent raised what it described as a “special plea” in which it complained that the applicant’s affidavit was “vague and embarrassing, vexatious and scandalous, and that it fails to coherently set out the nature of the Applicant’s claim and fails to deal adequately with how the Applicant quantifies its claim”.
- [11] It seems to me that it is more appropriate to describe this as an objection in limine that the applicant has failed to make out a proper case for the relief sought. The approach to be adopted in such cases is that outlined by Miller J in *Hart v Pinetown Drive-In Cinema (Pty) Ltd*[1]:

‘At the hearing [counsel] for the respondent, took in limine the point that the petition and supporting affidavit and documents contained

insufficient information to sustain the relief claimed. He contended that for the purposes of deciding this objection the Court would look only at the petition and supporting documents and not at all at the respondent's affidavit. It was accepted by [counsel] for the applicant, that the objection fell to be decided on the sufficiency or otherwise of the material contained in the petition and its annexures, the respondent's affidavit having been filed, in effect, as a plea-over in the event that the objection be over-ruled. (Cf. *Taylor v Welkom Theatres (Pty.) Ltd. and Others*, 1954 (3) SA 339 (O) at p. 345); *Aspek Pipe Co. (Pty.) Ltd. and Another v Mauerberger and Others* 1968 (1) SA 517 (C) at p. 519).’

[12] The learned Judge accepted the correctness of this approach which has been acknowledged in subsequent cases[2]. After examining the allegations contained in the founding affidavit Miller J concluded:

‘It has been said (see *Aspek Pipe Co.*, supra at p. 529) that in the case of an objection in limine of the kind now under consideration, the enquiry is only whether a prima facie case has been made out in the petition. It must be borne in mind, however, that where proceedings are brought by way of application, the petition is not the equivalent of the declaration in proceedings by way of action. What might be sufficient in a declaration to foil an exception, would not necessarily, in a petition, be sufficient to resist an objection that a case has not been adequately made out. The petition takes the place not only of the declaration but also of the essential evidence which would be led at a trial and if there are absent from the petition such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that it does not support the relief claimed is sound. For the reasons I have stated herein, I am of the opinion that there is a dearth of such facts as, if true, would support the allegations of unfair and oppressive conduct in the management of the company's affairs and the objection in limine must accordingly be upheld.’[3]

[13] In so far as the learned Judge indicated that reliance could be placed upon addenda attached to affidavits it is important to bear in mind the principle set out in *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others*[4]:

‘Regard being had to the function of affidavits, it is not open to an applicant or a respondent to merely annexe to its affidavit

documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof.’[5]

[14] Moreover, in having regard to the affidavits, the court must be careful to distinguish between primary and secondary facts:

‘Facts may be either primary or secondary. Primary facts are those capable of being used for the drawing of inferences as to the existence or non-existence of other facts. Such further facts, in relation to primary facts, are called secondary facts.’[6]

[15] In the absence of the primary facts from which the conclusion is drawn, the secondary facts are irrelevant or ‘merely a conclusion of law’.[7] (While the description of secondary facts as a conclusion of law may not be entirely accurate[8], the force of the principle remains.)

[16] In short, when dealing with in limine objections of the type raised by the respondent in the present matter, one has to have regard to the primary facts stated in the

founding affidavit and those aspects of addenda attached to the founding affidavit that have expressly been identified and relied

upon in the founding affidavit.

[17] A deponent in motion proceedings is in essence testifying as he or she would in trial proceedings.[9] Thus, the deponent must lead all such evidence as he or she would have led had it been a trial. Motion proceedings must not be lightly resorted to by a litigant contemplating a course of action to embark upon for the vindication of rights. Quite apart from the danger that disputes of fact may emerge from the respondent's affidavit, motion proceedings lack the full array of mechanisms inherent in trial proceedings that allow for the expeditious resolution of litigation. These mechanisms include the right to discovery (which has limited application in motion proceedings[10]), to request further particulars to a party's pleading and to call for a pre-trial conference and there seek to narrow the

issues

even further. Most importantly, the exchange of pleadings in trial proceedings is aimed at identifying the true issues in dispute and upon which the trial is to be conducted.

[18] In motion proceedings, unless there is a clear prior indication from the respondent that a particular fact is not in dispute (in which event the applicant should state that fact and the basis for the belief that the fact is not in dispute), the applicant must proceed on the assumption that all facts are in dispute and must lead all the evidence available to him or her on every element of the cause of action. The applicant must, as it were, 'stand or fall' by his founding affidavit and the allegations contained therein.[11] Of course, the court may in certain circumstances permit an applicant in the replying affidavit to introduce new facts to supplement the case set out in the founding affidavit or embroider on facts set out insufficiently in the founding affidavit.[12] But where such a case arises, the applicant must seek the court's indulgence in seeking to introduce the new matter and it must be clear that by allowing the new matter to be introduced would entail no unfairness to the respondent. [13] If necessary, the matter should be postponed to enable the respondent to answer to the new allegations. In the present case there was no suggestion that the applicant wished to supplement its case on the basis of facts set out in the replying affidavit; indeed, it was not in any way conceded that the founding affidavit was deficient in setting out the applicant's cause of action.

[19] With these principles in mind I turn now to consider the applicant's claim in the present matter.

[20] In the present case the applicant had to allege with sufficient factual detail as contemplated in the cases referred to above at least the following:

20.1 The applicant concluded an agreement of sale with the respondent, who represented the applicant in doing so and who represented the respondent in doing so.

20.2 The allegation had to be made that the individuals representing the parties were authorised to do so and the factual basis for such

assertion.

20.3 The applicant had to allege whether the agreement was written, oral or tacit and had to provide sufficient particularity in this regard. If written, it had to attach a copy of the agreement. If it relied upon tacit terms, it had to identify those terms and the factual circumstances which it alleged gave rise to those terms.

20.4 In terms of the agreement the applicant sold specified goods (security equipment) to the respondent who purchased those goods at the applicant's "usual prices". (I assume for present purposes that an agreement to pay the usual prices is not void for vagueness.)

20.5 It was a term of the agreement that the applicant would deliver the goods to the respondent together with an invoice reflecting the identity of the goods delivered and the value thereof.

20.6 The amounts set out in the invoice for a specific item represents the usual price charged by the applicant for such items.

20.7 The respondent undertook to pay the applicant within 30 days of delivery of the goods.

20.8 It was a term of the agreement that the respondent would acknowledge receipt of the goods by signing an invoice accompanying a consignment of goods.

20.9 Various consignments of goods were in fact delivered to the respondent and the dates thereof. The respondent, through its agent or authorised employee, signed each of the invoices acknowledging receipt of the goods identified in the invoices or, if not so acknowledged, direct evidence of when, how and to whom the goods were delivered.

20.10 Copies of the invoices had to be attached with the allegation that the invoices were signed by an agent or authorised employee. The recipient or the signature of the recipient had to be identified. Where proof of delivery was based upon the acknowledgment of receipt as evidenced by the signature of an authorised agent or employee, the deponent had to explain that he was familiar with the signature of such agent or employee.

20.11 The respondent undertook in terms of the agreement to pay the applicant within 30 days of receipt of an invoice, the date on which the invoices were delivered and the respondent had failed to make payment within the agreed period.

20.12 Where credit notes were issued the items in respect of which they were issued.

20.13 A detailed and careful explanation of how each of the amounts claimed was arrived at with reference to the applicant's usual price, the delivery of the goods, the submission of an invoice, the acknowledgement of receipt, the passing of a period of 30 days and the absence of payment.

[21] This is not the approach adopted by the applicant in the present case. A few examples will suffice:

21.1 While attaching invoices, the applicant has not alleged what its usual price was for specific items referred to in those invoices or that it charged such prices.

21.2 While alleging that a “representative” of the respondent “signed the invoices acknowledging delivery of the goods

supplied”, the deponent does not identify each specific invoice, where the signature appears on the invoice, whose signature

it is, how the deponent is able to identify the signature and the basis of the allegation that the signatory is a representative of the respondent.

[22] Even if one were inclined to take a benevolent view to the applicant’s case and examine each of the invoices, that would give rise to discrepancies between the allegations contained in the founding affidavit and the facts appearing from the attached addenda. For instance, despite the assertions contained in the founding affidavit that the claim was for goods “delivered to the respondent” whose representative signed for it, a number of the invoices contain no signature (annexures “LM11”, “LM23”, “LM25”, “LM42”, “LM58”, “LM73” and “LM79”), several invoices (annexures “LM23”, “LM25”, “LM42”, “LM73” and “LM79”) contain a typed note that the “stock was collected” (as opposed to being delivered to the respondent), [14] at least one of the statements (page 13 of the bundle) indicates that part of the claim relates to “repairs” (when no such case was pleaded), one of the invoices (annexure “LM37”) has a handwritten annotation “paid cash” and another invoice (annexure “LM38”) indicates “replacement of faulty stock”.

[23] In short, the manner in which this case was presented was wholly unsatisfactory in motion proceedings and the applicant has accordingly failed to make out a proper case as contemplated in *Hart v Pinetown Drive-in Cinema supra*. Had action proceedings been adopted very few of these anomalies and discrepancies may have become issues.

[24] Counsel for the applicant suggested that if I should come to this conclusion, the matter should be referred to oral evidence. In light of the remarks of Harms JA in *Valentino Globe, supra*, this is not possible. Where a party has failed to make out a case in its founding affidavit, it cannot request a referral to oral evidence in order to supplement that case.

[25] In all the circumstances, I am satisfied that the point in limine is well taken and therefore make an order in the following terms:

25.1 The application is dismissed with costs.

G. HULLEY

Acting Judge of South Gauteng High Court

For the applicant: Adv. M G Gioia

Instructed by: Miranda Vermaas Inc. Attorneys

For the Respondent: Adv. J Scallan

Instructed by: Hengst & McMaster Attorneys

[1] 1972

(1) SA 464 (D)

[2] See Valentino Globe BV v Phillips & Another [1998] ZASCA 43; 1998

(3) SA 775 (SCA), at 779E – 780B

[3] At 469C – E

[4] Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others 1999

(2) SA 279 (T)

[5] At 324F/G

[6] Die Dros (Pty) Ltd v Telefon Beverages CC & Others 2003

(4) SA 207 (C); Swissborough, supra, at 324D – E

[7] Swissborough, supra, at 324E; Radebe and Others v Eastern Transvaal Development Board 1988

(2) SA 785 (A) at 793D

[8] Willcox and Others v Commissioner for Inland Revenue 1960

(4) SA 599 (A) at 602A

[9] Venmop 275 (Pty) Ltd and Another v Cleverlad Projects (Pty) Ltd and Another 2016

(1) SA 78 (GJ), at 86A

[10] Rule 35(12) and (13)

[11] Direct of Hospital Services v. Mistry 1979

(1) SA 626 (A), at 635H – 636A

[12] Riddle

v. Riddle 1956 (2) SA 739 (C), at 747H – 748A

[13] Riddle

v. Riddle, supra, at 748C

[14] It is clear that delivery is used in the founding affidavit to mean that the goods were taken to the respondent's place of business and handed over.

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Prepared on 12 October 2026 · Esheria